

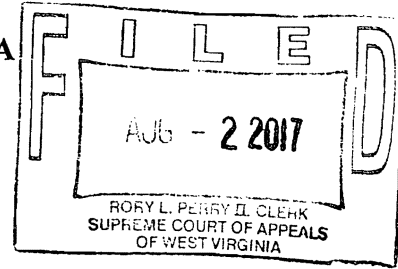
SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH,
Plaintiffs Below, Petitioners,

vs.

Case No. 17-0206
(Ohio County Action No. 13-C-32)

ROBERT TODD GEBHARDT,
MICHAEL COYNE, and TRIPLE S&D, INC.,
Defendants Below, Respondents.



**APPELLATE BRIEF OF
RESPONDENT ROBERT TODD GEBHARDT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
I. Procedural History	1
II. Statement of Facts	6
SUMMARY OF ARGUMENT	11
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	11
ARGUMENT	11
I. Standard of Review	11
II. Discussion	12
1. Petitioners have not established that the trial court’s dismissal was based upon an erroneous assessment of the evidence.....	12
2. Petitioners have not established that the trial court’s dismissal was based upon an erroneous assessment of the law.....	14
CONCLUSION	26

TABLE OF AUTHORITIES

<u>Bartles v. Hinkle</u> , 196 W. Va. 381, 472 S.E.2d 827 (1996).....	12, 14, 15, 21, 26
<u>Cattrell Cos. v. Carlton, Inc.</u> , Syl. Pt. 6, 217 W. Va. 1, 614 S.E.2d 1 (2005).....	20
<u>Chambers v. NASCO, Inc.</u> , 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991).....	12
<u>E.G. v. Matin</u> , 20 W. Va. 463, 498 S.E.2d 35 (1995).....	22
<u>Keplinger v. Virginia Elec. & Power Co.</u> , 208 W. Va. 11, 537 S.E.2d 632 (2000).....	21, 22
<u>Kocher v. Oxford Life Ins. Co.</u> , 216 W. Va. 56, 602 S.E.2d 499 (2004).....	23
<u>National Hockey League v. Metropolitan Hockey Club</u> , 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747, 751 (1976).....	26
<u>State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders</u> , 226 W. Va. 103, 697 S.E.2d 139 (2010).....	14, 20
<u>State v. Allen</u> , 208 W. Va. 144, 539 S.E.2d 87 (1999).....	22
West Virginia Code § 62-1D-3(e).....	24
West Virginia Rule of Civil Procedure 1.....	24
West Virginia Rule of Civil Procedure 5.....	21, 22
West Virginia Rule of Civil Procedure 26.....	18, 25
West Virginia Rule of Civil Procedure 45.....	21, 22
West Virginia Rule of Evidence 102.....	24
West Virginia Rule of Evidence 407.....	24
West Virginia Rule of Evidence 408.....	24

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On September 27, 2013, Kenneth and Terri Smith, Plaintiffs below and Petitioners herein, filed a Complaint alleging various claims against Robert Todd Gebhardt, Defendant below and Respondent herein, related to construction of a new residential property for Petitioners in Triadelphia, Ohio County, West Virginia. See Complaint, Appendix pgs. 129-167. Subsequent to the filing of the initial Complaint, Petitioners moved the trial court to join Michael Coyne and Triple S&D, Inc., alleged to have been hired to complete the masonry work related to the subject residential construction, including construction of the block foundation and installation of the brick veneer. See Second Amended Complaint, Appendix pgs. 441-481.

Relevant to the instant appeal, on September 21, 2015, Respondent Gebhardt filed seven (7) motions in limine / motions for sanctions related to Plaintiffs' experts – Alan Baker (Appendix pgs. 736-749), Martin Maness (Appendix pgs. 720-735), Fred Casale (Appendix pgs. 768-771), John Gongola (Appendix pgs. 750-759), Josh Emery (Appendix pgs. 760-767), Louis Costanzo (Appendix pgs. 772-783), and Richard Derrow (Appendix pgs. 784-790); one (1) motion to strike Plaintiffs' expert, Jake Lammott (Appendix pgs. 791-794); one (1) "Omnibus Motion in Limine" comprised of 34 subparts (Appendix pgs. 795-819); seven (7) motions for summary judgment, including a motion for summary judgment on Plaintiffs' comparative negligence (Appendix pgs. 820-826), a motion for summary judgment on Plaintiffs' West Virginia Consumer Credit and Protection Act claim (Appendix pgs. 1006-1014), a motion for summary judgment on Plaintiffs' fraud claims (Appendix pgs. 1038-1045), a motion for summary judgment on Plaintiffs' claim for "intentional interference with warranty contracts" (Appendix pgs. 1015-1021), a motion for summary judgment on Plaintiffs' failure to mitigate

damages (Appendix pgs. 1022-1028), a motion for summary judgment on punitive damages (Appendix pgs. 999-1005), and a motion for summary judgment on Plaintiffs' water intrusion claim (Appendix pgs. 1029-1037); and one (1) motion to dismiss (Appendix pgs. 1046-1055).¹ The same were necessary to address Petitioners' unsupported expert disclosures and inaccurate application of the law.

On October 16, 2015, the parties appeared in front of the trial court for the matter's first Pretrial Conference. See Hearing Transcript, Appendix pgs. 2138-2234. The trial court considered arguments on Respondent Gebhardt's Motion to Dismiss and no other motions were addressed. See Hearing Transcript, Appendix pgs. 2138-2234. During the course of that conference, the trial court explained several times the basis of Respondent's argument:

THE COURT: I don't think that's what they're complaining about. They're complaining you didn't let them know and you didn't save the sample.

MR. KASSERMAN: Well you say –

THE COURT: Is that accurate?

MR. CRAYCRAFT: Yes, Your Honor. We're supposed to take his word for it.

...

THE COURT: They're complaining because you didn't give them notice of the testing. They wanted to be present, I think is what they're complaining about.

MR. CRAYCRAFT: Yes, Your Honor.

See Hearing Transcript, Appendix pgs. 2173-2174.

Days after the Pretrial Conference, the trial court postponed the trial scheduled for November 2, 2015, citing the "volume of pretrial motions, responses, exhibits and expert

¹ The exhibits referenced in Respondent Gebhardt's Motions in Limine / Motions for Sanctions, Motions for Summary Judgment, Omnibus Motions in Limine, and Motion to Dismiss were compiled and produced together as a single attachment. These exhibits were docketed by the Ohio County Circuit Clerk at Docket No. 297 and incorrectly identified as "Plaintiffs' Third Expert Witness Disclosure Ex. 1-34." The same are believed to be contained at Appendix pgs. 1056-1388.

testimony for the Court to address...” The trial was rescheduled for November 14, 2016. See Scheduling Order, Appendix pgs. 52-53.

In April 2016, the trial court ruled on Respondent Gebhardt’s motions for summary judgment and dismissed Petitioners’ fraud and fraudulent inducement, “intentional interference with warranty contracts,” West Virginia Consumer Credit and Protection Act, and punitive damages claims. See Appendix pgs. 54-83.

On April 15, 2016, the trial court entered an Order denying Respondent Gebhardt’s motion to dismiss as a sanction for spoliation of evidence by Plaintiffs and Plaintiffs’ counsel, finding that “dismissal of this action is not an appropriate remedy for the conduct alleged” in the motion but indicating that the trial court would “address Gebhardt’s request for alternative sanctions in a separate Order.” See Appendix pg. 84.

In October 2016, the trial court proceeded to enter orders related to Respondent Gebhardt’s various motions in limine, which limited certain testimony of Petitioners’ experts, narrowed Petitioners’ damages in accord with West Virginia law, and excluded certain evidence and testimony.² See Appendix pgs. 85-121.

Based upon the trial court’s evidentiary rulings, Respondents Coyne / Triple S&D filed its Motion for Summary Judgment on November 3, 2016, challenging Petitioners’ causation and the case in general. See Appendix 1807-1833. Respondent Gebhardt subsequently filed a similar motion challenging Petitioners’ causation. See Appendix pgs. 1883-1914.

The parties appeared for the second Pretrial Conference in this matter on November 4, 2016. See Hearing Transcript, Appendix pgs. 2235-2277. The trial court inquired as to the

² The trial court provided the parties with a copy of an Order pertaining to Petitioners’ expert, John Gongola, during the Pretrial Conference on November 4, 2016, which was corrected and entered with the circuit clerk nunc pro tunc on March 9, 2017. See Appendix pgs. 124-128. The trial court also entered an Order relative to Petitioners’ expert, Jake Lammott, on March 9, 2017. See Appendix pgs. 122-123.

outstanding issues, which were identified as Coyne / Triple S&D's Motion for Summary Judgment; Gebhardt's Motion in Limine / Motion for Sanctions regarding Petitioners' expert, John Gongola, joined by Respondents Coyne / Triple S&D; Gebhardt's Motion to Strike Petitioners' expert, Jacob Lammott; Petitioners' Motion for Judicial Notice of building codes; and a verbal motion by counsel for Respondents Coyne / Triple S&D for a view of the subject residence. See Hearing Transcript, Appendix pgs. 2235-2277. No other issues were identified by any party at the Pretrial Conference. See Hearing Transcript, Appendix pgs. 2235-2277. Again, at the Pretrial Conference, upon discussion of a possible jury view, the parties and trial court had the following exchange:

MR. KASSERMAN: We can schedule that however - - really, if we're going to look at the house, and I have been admonished by the Court for busting up my wee little portion, a 2-foot-by-2-foot area . . . What's left is what you can see that hasn't been demolished, and if you hadn't - - if we hadn't done that, then the negligence would have been - -

THE COURT: All you have to do is give them notice.

MR. KASSERMAN: - - covered over.

THE COURT: You had a pending lawsuit. You're going to do that, just give them notice. You can do that.

MR. KASSERMAN: I - I made a mistake.

See Hearing Transcript, Appendix pg. 2270.

Following the Pretrial Conference, faced with the prospect of dismissal for lack of causation, Petitioners developed a theory that the foundation was not constructed in accord with the plans and, on November 7, 2016, in an attempt to perpetuate this theory, Petitioners unilaterally issued a subpoena *duces tecum* directly upon Respondent Gebhardt at his home, after

dark, commanding his appearance in Marshall County³ on the first day of trial on November 14, 2016, and demanding production of “receipts for gravel applied to the basement floor of the house [he] built for Terri and Kenneth Smith, which was placed below the vapor barrier before the concrete was poured.” See Subpoena *Duces Tecum*, Appendix pgs. 1875-1876. No notice was provided to Gebhardt’s counsel that a subpoena *duces tecum* was going to be served upon Gebhardt.

Respondent Gebhardt filed a Motion to Dismiss on November 14, 2016, which alleged that service of the subpoena *duces tecum* upon Respondent Gebhardt constituted “harassment and intimidation of a key party-defendant in litigation on the eve of trial.” See Motion to Dismiss, Appendix pgs. 1864-1874. Upon receipt of the motion, the trial court cancelled the trial scheduled for November 14, 2016, and set the matter for an evidentiary hearing on November 15, 2016. A recitation of the factual developments at the evidentiary hearing is provided in the “Statement of Facts” section below.

The trial court afforded the parties the opportunity to provide supplemental briefing following the evidentiary hearing in relation to the Motion to Dismiss. See Hearing Transcript, Appendix pgs. 2429-2430. Respondent Gebhardt submitted his Supplemental Brief in Support of his Motion to Dismiss on December 2, 2016. See Brief, Appendix pgs. 1915-1926. Petitioners submitted their Supplemental Memorandum in Opposition to Defendant Gebhardt’s Motion to Dismiss on December 14, 2016. See Memorandum, Appendix pgs. 1927-1951.

On February 3, 2017, the trial court entered a 27-page order dismissing Petitioners’ case, including extensive findings of fact and conclusions of law in support thereof. Petitioners filed the instant appeal on or around March 2, 2017. See Order, Appendix pgs. 1-27.

³ Prior to this appeal, the matter had always been docketed with the Circuit Court of Ohio County, the Honorable David J. Sims presiding.

II. STATEMENT OF FACTS

The trial court summoned the parties for an evidentiary hearing on November 15, 2016, to address the allegations contained in Defendant Gebhardt's Motions to Dismiss. The following issues were developed and admissions regarding the same were made by Petitioners:

Petitioners' Complaint detailed instances in which Petitioners intentionally caused water damage to their home by positioning a garden hose at the corners of their house for periods of time lasting from 25 minutes to 1 hour and 30 minutes. See Complaint, Appendix pgs. 138, 140. During the evidentiary hearing, Petitioners admitted under oath that they watered their house with a garden hose with the specific intent and purpose of forcing water into the corners of their basement alleged to be at issue in this litigation in order to prove their case against Respondents. See Hearing Transcript, Appendix pgs. 2307-2310, 2347, 2350-2352. Petitioners testified under oath that this intentional watering resulted in damage to those corners. See Hearing Transcript, Appendix pgs. 2307-2310, 2352.

During an inspection of the home on October 9, 2014, it was discovered that Petitioners had blocked their foundation drainage system, thereby restricting the flow of water away from their home and causing water intrusion and damage. Respondent Gebhardt subsequently gave deposition testimony on March 17, 2015, regarding his defense that "[a]nytime you block an away drain off on a hard rain or a lot of precipitation, it's going to back up the water into the foundation, which is exactly what is happening here. A drain should never be capped off with anything. It restricts the operation of the pipes." See Deposition of Respondent Gebhardt, Appendix pgs. 3121-3122. The blockage was referenced on numerous occasions throughout Respondent Gebhardt's deposition as a cause or contributor to Petitioners' alleged water

intrusion issues. See Deposition of Respondent Gebhardt, Appendix pgs. 3117-3118, 3121-3122, 3134, 3228.

Without any notice to any party or any party's counsel, the very next day on March 18, 2015, Petitioners destroyed the evidence. Notice of the same was not provided to Respondent Gebhardt until April 1, 2015, at which time photographs were provided with Plaintiffs' Seventh Supplemental Responses to Defendant Gebhardt's Discovery Requests. See Appendix pgs. 3764-3765, 5223-5226. Petitioners admitted during the evidentiary hearing that they were present when Respondent Gebhardt testified during his deposition that Petitioners' foundation away drain was blocked and that the blockage could result in water intrusion into their basement. See Hearing Transcript, Appendix pgs. 2310-2313, 2352-2353, 2357. Petitioners further admitted under oath at the evidentiary hearing that they removed the blockage the very next day without notifying or informing Respondent Gebhardt, his counsel, or the trial court. See Hearing Transcript, Appendix pgs. 2310-2313, 2347, 2354-2355, 2358. Petitioners again testified that this was done in order to improve Petitioners' case against Respondents. See Hearing Transcript, Appendix pgs. 2310-2313.

On March 26, 2015, Petitioners filed their Fifth Supplemental Disclosure, which was accompanied by notes taken by Petitioner Terri Smith admitting that the brick on Petitioners' home was dismantled in two phases approximately 5 months prior on November 3, 2014, and November 7, 2014. See Appendix pgs. 1153-1156, 5214, 5221. During the evidentiary hearing, Petitioners admitted that bricks were removed from one of the two corners alleged to be at issue on their home. See Hearing Transcript, Appendix pgs. 2313-2316, 2347, 2358-2360. Petitioners also admitted that the bricks were destructed over 2 years ago and that the home has been exposed since that time. See Hearing Transcript, Appendix pgs. 2313-2316, 2358-2360.

Petitioners admitted that this was done without notifying or informing Respondent Gebhardt, his counsel, or the trial court. See Hearing Transcript, Appendix pgs. 2313-2316, 2347, 2358-2360. Petitioners also admitted under oath that the purpose of destructing the brick was to prove their water intrusion claims against Respondents. See Hearing Transcript, Appendix pgs. 2313-2316, 2358-2360.

On March 26, 2016, Petitioners' counsel circulated an email, enclosing photographs, depicting that on March 20, 2015, Petitioners, Petitioners' counsel, and Petitioners' expert, John Gongola, had deconstructed a connection between the basement stairs and cement floor.⁴ See Appendix pgs. 1149-1152. A hole was created and the area beneath the slab allegedly manipulated and examined. See Appendix pgs. 1149-1152. Petitioners admitted under oath at the evidentiary hearing that they deconstructed their basement bannister with the intent to prove a case against Respondent Gebhardt and agreed that this was done without notifying or informing Respondent Gebhardt, his counsel, or the trial court. See Hearing Transcript, Appendix pgs. 2316-2317, 2347, 2360-2364.

Plaintiffs' expert, John Gongola, conducted a four-hour inspection at Plaintiffs' home on September 25, 2014. See January 20, 2015, Mold Report, Appendix pgs. 6257-6353. During the inspection, Mr. Gongola collected air samples and performed wall cavity tests which involved drilling "aperture[s] in the drywall." See Appendix pgs. 4480, 6257-6353. No other parties were invited or alerted. Further, the moisture meter readings and samples taken at Mr. Gongola's inspection were not preserved. See Appendix pgs. 4480, 4513-4514, 6257-6353.

Following a letter sent by Petitioners' counsel to Defendant Gebhardt threatening litigation, Respondent Gebhardt met with Petitioner Terri Smith and Petitioners' counsel at the

⁴ The basement bannister was repeatedly and specifically identified by Petitioners as an alleged problem with the subject home. See Appendix pgs. 137, 155, 313.

subject residence on April 9, 2013. See Letter, Appendix pg. 1330-1332. On June 26, 2014, more than one year after the meeting and nearly a year after Plaintiffs filed their Complaint, Petitioners produced an audio recording from the April 9, 2013, meeting with their Supplemental Responses to Respondent Gebhardt's Discovery Requests. See Appendix pgs. 1153-1156. Petitioners admitted under oath at the evidentiary hearing that they participated in obtaining a secret recording of Respondent Gebhardt, without his knowledge or consent, intending to utilize the same against him in the litigation. See Hearing Transcript, Appendix pgs. 2322-2324, 2371. Respondent Gebhardt testified at the evidentiary hearing that upon learning of the secret recording, he "felt totally violated by that when I found out." See Hearing Transcript, Appendix pg. 2396.

Petitioners admitted during the evidentiary hearing that they gave consent to their disclosed expert, Jake Lammott, to spray paint portions of their basement block walls bright orange. See Hearing Transcript, Appendix pgs. 2318-2320, 2377. Petitioners agreed that it made the walls in their basement "look bad."⁵ See Photographs, Appendix pgs. 5155-5162; see also Hearing Transcript, Appendix pg. 2319, 2377.

During the evidentiary deposition, Petitioners also admitted knowledge of communication with Respondent Gebhardt's retained consultant, Phil Huffner, by their counsel and disclosure of the consultant in Petitioners' fact and expert witness disclosures. See Hearing Transcript, Appendix pgs. 2324-2331, 2375.

Petitioners further admitted under oath during the evidentiary hearing to receiving an estimate of \$44,000 from Baker's Waterproofing, which they then passed off as a legitimate,

⁵ Mr. Lammott testified during his deposition that he could have used chalk or crayon or pencil to mark the basement walls instead of orange spray paint. See Deposition Transcript of Jake Lammott, Appendix pg. 3717.

recommended estimate for repair even though this was neither recommended nor warranted by Baker's Waterproofing. See Hearing Transcript, Appendix pgs. 2369.

Petitioners admitted that a subpoena *duces tecum* was served upon Respondent Gebhardt at his home less than a week before trial commanding him to appear in Marshall County, West Virginia, on the first day of trial with gravel receipts dating back 7 years. See Hearing Transcript, Appendix pgs. 2331-2332. Counsel for Petitioners conceded that because Respondent Gebhardt's counsel was unlikely to assist in providing the requested materials, the subpoena *duces tecum* was not provided to counsel for Respondent Gebhardt. See Hearing Transcript, Appendix pgs. 2428-2429. Moreover, Petitioners conceded during the evidentiary hearing and have again conceded in their brief that no notice was ever provided to Gebhardt's counsel of the subpoena *duces tecum*. See Appendix pgs. 1927-1944, 2424-2426.

During the evidentiary hearing, Respondent Gebhardt recounted service of the subpoena – he testified that a person unknown to him appeared on his personal property after dark, provided the subpoena *duces tecum*, and told him that some invoices were being requested for gravel. See Hearing Transcript, Appendix pgs. 2397-2400. Respondent Gebhardt testified that he then engaged in communication with the unknown third party for a period of 8 to 10 minutes, which included discussion of the invoices requested by the subpoena and how Gebhardt may obtain the same. See Hearing Transcript, Appendix pgs. 2401.

Believing that this was a proper and legitimate legal document, Respondent Gebhardt testified during the evidentiary hearing that he “thought [he] had to produce [the receipts]” and explained the subsequent contact and communication with employees of Contractor Supply, employees of Belmont Aggregate, and Craig Templin (identified as a trial fact witness) in

relation to the lawsuit and the improperly requested gravel receipts. See Hearing Transcript, Appendix pgs. 2398-2399, 2403.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in dismissing Petitioners' case as a sanction for litigation misconduct, including destruction and manipulation of evidence, filing unsupported expert disclosures, engaging in improper contact with Respondent Gebhardt's consultant, obtaining improper and unauthorized audio recording of Respondent Gebhardt after initiation of the adversary process, and issuing a subpoena *duces tecum* upon Respondent on the eve of trial without notice to / in a specific attempt to circumvent Respondent Gebhardt's counsel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, based upon the arguments asserted herein in response to Petitioners' claims, oral argument is unnecessary because Petitioners' appeal is frivolous, the facts and legal arguments are adequately presented in the briefs and record on appeal, and/or the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. STANDARD OF REVIEW

"A primary aspect of . . . [a trial court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Bartles v. Hinkle, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 44-45, 111 S. Ct. 2123, 2132-33, 115 L. Ed. 2d 27, 45 (1991)). A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law. Id. Accordingly, this Court should

analyze the trial court's February 3, 2017, Order awarding sanctions under an abuse of discretion standard.

II. DISCUSSION

Petitioners allege that the trial court abused its discretion in sanctioning Petitioners' conduct by way of dismissal as detailed in the trial court's February 3, 2017, Order. However, Petitioners have failed to establish for this Court that the trial court abused its discretion through an erroneous assessment of the evidence or the law and, therefore, the trial court's order should be affirmed. See Bartles v. Hinkle, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 44-45, 111 S. Ct. 2123, 2132-33, 115 L. Ed. 2d 27, 45 (1991)).

1. Petitioners have not established that the trial court's dismissal was based upon an erroneous assessment of the evidence

Initially, the trial court's ruling was not based on any erroneous assessment of the evidence and Petitioners' contention that it was is unfounded given the repeated admissions of Petitioners of their own culpability for the sanctioned conduct.⁶

The evidence presented to the trial court on November 15, 2016, upon which it rendered its decision to dismiss Petitioners' case was confirmation of a repeated pattern of conduct by Petitioners to further their claims and obtain an unfair advantage against Respondent Gebhardt without notice to anyone else. Petitioners admitted under oath to watering their home without notice to Respondent Gebhardt. Petitioners admitted under oath to unblocking their away drain without notice to Respondent Gebhardt. Petitioners admitted under oath to luring Respondent

⁶ Review of Petitioners' Appellate Brief suggests Petitioners' position is that the trial court offered an erroneous assessment of the evidence regarding the water damage and an erroneous assessment of the photographic evidence regarding the water damage in dismissing Petitioners' case. However, as discussed herein, Petitioners' attempt to shift focus away from Petitioners' admitted conduct and culpability should be deemed misplaced and unpersuasive by this Court.

Gebhardt to a meeting and then secretly recording him for future impeachment purposes. Petitioners admitted to destructing brick on the outside of their home without notice to Respondent Gebhardt. Petitioners admitted awareness of communications with Respondent Gebhardt's expert consultant without notice to Gebhardt and service of a subpoena *duces tecum* on the eve of trial without prior notice to Gebhardt.

The trial court confirmed the conduct and culpability of the Petitioners through their admissions at the evidentiary hearing and, through such testimony, the trial court learned that the conduct was not negligent, but rather that the conduct was willful and intentional and performed in a specific attempt to prevail over Respondent Gebhardt in this litigation. The trial court then afforded the parties the opportunity to support their positions and challenge opposing positions through written pleadings and responses, which were then carefully reviewed and assessed by the trial court. Significantly, Petitioners again, in writing, conceded to the conduct alleged to be at issue.

Finally, at the conclusion of the presentation of the evidence, following hours of testimony and briefing, the trial court carefully and thoughtfully issued a twenty-seven (27) page Order dismissing Petitioners' case, providing meticulous detail of the trial court's findings of fact in support of its award of dismissal as a sanction for Petitioners' repeated pattern of conduct throughout the litigation. Even through presentation of Petitioner's Notice of Appeal and Appellate Brief filed with this Court, Petitioners have repeatedly admitted to the conduct alleged to be at issue and have conceded that Respondent Gebhardt was deprived of notice of the same.

It is clear from the trial court's Order that the sanctions in this case were fashioned to address Petitioners' conduct in the destruction and manipulation of evidence, in corresponding with Gebhardt's consultant, in secretly recording Gebhardt, and in misusing / improperly issuing

a subpoena *duces tecum* on the eve of trial, all of which Petitioners admittedly did without any notice to Respondent Gebhardt. What is most remarkable is that Petitioners have admitted to each and every instance of the misconduct alleged and still have filed this appeal asserting that the trial court's assessment of the evidence, which, by virtue of the trial court's Order pertains only to Petitioners' conduct, is erroneous. Accordingly, Petitioners' contention that the trial court abused its discretion because the dismissal was based on any erroneous assessment of evidence is misplaced and should be rejected by this Court.

2. Petitioners have not established that the trial court's dismissal was based upon an erroneous assessment of the law

The trial court's ruling to dismiss Petitioners' case as a sanction for their wrongful conduct was not based on any erroneous assessment of the law and was instead based upon the legal application of the trial court's inherent authority to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. See State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W. Va. 103, 111 (2010).

In Bartles v. Hinkle, 196 W. Va. 381 (1996), this Court provided guidance on the considerations to be assessed by a trial court in formulating an appropriate sanction. As stated in Bartles:

Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Id. at Syl. Pt. 2.

In its assessment of the arguments of the parties, the trial court identified ten (10) instances of alleged wrongful conduct by Petitioners:

1. Secretly Destroying and Manipulating Evidence;
2. Watering [Petitioners'] Home;
3. Destructing Brick;
4. Blocking [Petitioners'] Own Away Drain;
5. Performing a Bannister Test Without Notice to Defendants;
6. Performing Mold Tests Without Notice to Defendants;
7. Filing Untruthful and Inaccurate Expert Disclosures;
8. Improperly Recording Gebhardt;
9. Improperly Communicating with and Retaining Gebhardt's Rule 26(b)(4) Non-Testifying Consultant; and
10. Improperly Contacting Gebhardt through a Third Party without Notice to Gebhardt's Counsel.

See Appendix pgs. 1-27.

The trial court's intensely detailed twenty-seven (27) page Order further identified the basis for sanctions with regard to the identified misconduct. With regard to the wrongful conduct of Petitioners by secretly destroying and manipulating evidence, which includes "(1) permitting the basement walls to be spray painted orange; (2) intentionally watering the foundation; (3) removing a portion of the brick exterior; and (4) blocking the away drain", the trial court reiterated the admissions of Petitioners at the evidentiary hearing on November 15, 2016, and explained as follows:

Each of these actions irretrievably taints evidence and contaminates Plaintiffs' claim that Gebhardt's negligence proximately caused the water

intrusion and the resulting damages. Their conduct in each of these four (4) areas appears to be a conscious effort by Plaintiffs to unfairly influence the outcome of the litigation in their favor on the issues of both liability and damages. Plaintiffs' actions involve more than mere negligence. Plaintiffs have acted willfully, intentionally, and in bad faith . . .

Plaintiffs are personally culpable for this conduct as they have permitted the basement walls to be painted orange and have actively engaged in watering the foundation, deconstructing the bricks, and blocking the away drain. The spoliation of evidence set forth above is not solely the misconduct of their counsel. Plaintiffs bare substantial responsibility for the destruction, alteration, and spoliation of evidence.

It is clear that Plaintiffs had full control, ownership, possession or authority over the destroyed or significantly altered evidence and that Plaintiffs engaged in each of the listed actions without prior notice to Defendants. Defendants are significantly prejudiced by the destruction or alteration of the evidence without prior notice by Plaintiffs . . . It would be exceedingly difficult if not impossible for a trier of fact to determine which instances of water intrusion and resulting water stains were caused by Gebhardt's negligence, if any, and which were caused by Plaintiffs' self-inflicted actions . . .

See February 3, 2017, Order, Appendix pg. 19-20.

With regard to the wrongful conduct of Petitioners in performing (5) a bannister test and (6) mold test without notice to Respondents, the trial court reiterated the admissions of Petitioners at the evidentiary hearing on November 15, 2016, and explained as follows:

Plaintiffs' conduct in performing the bannister testing and mold testing without prior notice to Defendants was wholly improper and contrary to the fair administration of justice . . . Considering the totality of the circumstances in this matter, the Court concludes that Plaintiffs' conduct in this regard was designed to provide [Petitioners] with an unfair advantage at the trial of this matter.

See February 3, 2017, Order, Appendix pg. 20-21.

With regard to the wrongful conduct of Petitioners of (7) filing untruthful and inaccurate expert disclosures, the trial court reiterated the admissions of Petitioners at the evidentiary hearing on November 15, 2016, and explained as follows:

. . . Plaintiffs filed several untruthful and inaccurate expert disclosures. The filing of these disclosures sent Defendants on a costly and time consuming wild goose chase in discovery.

Plaintiffs disclosed Mr. Maness as one of their main construction experts. Plaintiffs disclosed no less than 22 separate opinions held by Mr. Maness. However, at his deposition, Mr. Maness disclaimed or withdrew a significant number of those opinions. No less than 13 of the opinions were ultimately excluded by the Court . . .

Plaintiffs attempted to claim damages they could not lawfully recover through their flooring expert, Richard Derrow . . .

. . . [A]fter reviewing Mr. Casale's deposition transcript, the Court excluded Mr. Casale from offering expert opinions at trial as to the cause of the water intrusion into Plaintiffs' basement.

Plaintiffs' waterproofing expert, Josh Emery, was designated to testify with regard to a home warranty, proposals regarding work to be done on the house, and opinions regarding causation. Mr. Emery gave Plaintiffs an estimate in the amount of \$16,956.00 to waterproof their basement which had a guarantee of a "dry, usable space." Plaintiffs and Plaintiffs' counsel subsequently requested a second proposal, in which Mr. Emery provided an estimate in the amount of \$44,114.00, with no warranty. Mr. Emery testified at his deposition that he did not recommend the second more expensive proposal. The Court excluded the second proposal requested by Plaintiffs from evidence . . .

Plaintiffs disclosed John Gongola as an expert regarding the hazards of mold and construction issues. After reviewing his deposition transcript, the Court ruled that Mr. Gongola does not have the requisite knowledge, training, or experience to opine in areas of medicine, the effects of mold on general health, and/or the effects of alleged mold in Plaintiffs' home . . . and precluded him from rendering any opinions at trial regarding the adverse health effects of mold.

Further, the Court found that Mr. Gongola had no construction experience and, as a result, precluded him from offering opinions regarding construction matters at the trial of this matter. Finally, the Court found that Mr. Gongola is not a certified contracting remediator and that therefore, he may not offer opinions and estimates regarding the costs of mold remediation in Plaintiffs' home.

Finally, Plaintiffs disclosed Alan Baker as one of their construction experts. As with Mr. Maness, Plaintiffs disclosed no less than 23 separate opinions held by Mr. Baker. At his deposition, Mr. Baker disclaimed no less than 16 of those 23 opinions. Of the 7 remaining disclosed opinions, the Court excluded 5 of them.

See February 3, 2017, Order, Appendix pg. 20-23.

With regard to the wrongful conduct of Petitioners in (8) improperly recording Gebhardt, the trial court reiterated the admissions of Petitioners at the evidentiary hearing on November 15, 2016, and explained as follows:

The Court finds that the surreptitious recording of Gebhardt by Plaintiffs and Plaintiff's counsel, while not illegal and not clearly unethical, was dishonorable and undermined the integrity of the judicial system. It was underhanded and prejudicial to the fair administration of justice. The Court finds that Plaintiffs' conduct was deceitful, and that Plaintiffs and Plaintiffs' counsel misrepresented themselves to Gebhardt . . .

See February 3, 2017, Order, Appendix pg. 23-24.

With regard to the wrongful conduct of Petitioners of (9) improperly communicating with and retaining Gebhardt's Rule 26(b)(4) non-testifying consultant, the trial court reiterated the admissions of Petitioners at the evidentiary hearing on November 15, 2016, and explained as follows:

Given that Plaintiffs had already disclosed at least two (2) other experts on construction issues, the Court can only conclude that Plaintiffs retained Mr. Huffner in an effort to obtain an unreasonable advantage over Gebhardt in this litigation. The retention of Mr. Huffner by Plaintiffs is fundamentally and patently unfair to Gebhardt.

See February 3, 2017, Order, Appendix pg. 25.

With regard to the wrongful conduct of Petitioners in (10) improperly contacting Gebhardt through a third party without notice to Gebhardt's counsel, and of Petitioners' failure to follow traditional and accepted notice requirements throughout the entire course and duration of the litigation, the trial court reiterated the admissions of Petitioners at the evidentiary hearing on November 15, 2016, and explained as follows:

On more than one occasion in this litigation, the Court has found that Plaintiffs' failure to provide prior notice to Defendants of their testing or

manipulating of evidence was improper. While the Court has excluded some of the evidence, to date, the Court has declined to impose sanctions for Plaintiffs' conduct. Given this fact, Plaintiffs' decision to directly serve a defective subpoena on Gebhardt without prior notice to his counsel one week prior to trial is particularly egregious conduct. Especially in light of the fact that the parties were before the Court a few days before the subpoena was issued, and Plaintiffs' counsel failed to advise the Court that there were any outstanding discovery issues. Plaintiffs repeated disregard for the notice requirements in this litigation, despite this Court's admonishments, demonstrates Plaintiffs' reckless disregard for proper judicial process. Plaintiffs were simply not deterred by the Court's prior Orders. Plaintiffs should have been cognizant of the possible ramifications of continuing to disregard notice to Defendants . . .

See February 3, 2017, Order, Appendix pg. 25.

With regard to the culpability of Petitioners and the pattern of Petitioners' misconduct, the trial court explained its dismissal as follows:

Each of these actions in and of themselves would not necessarily give rise to the imposition of sanctions. In fact, to date, the Court has declined to impose sanctions for some of the individual conduct listed above. However, taken as a whole, Plaintiffs' actions demonstrate a pattern of misconduct by Plaintiffs and their counsel that undermines the judicial process, impedes the fair administration of justice, and deprives Defendants of their right to a fair trial in this matter . . .

The Court finds that Plaintiffs are culpable in a significant part of the misconduct that has occurred in this matter . . . Given the totality of the circumstances in this matter, in order to protect the integrity of the judicial process, dismissal is the most appropriate sanction for Plaintiffs' misconduct in this matter.

See February 3, 2017, Order, Appendix pgs. 19, 27.

Due to the severity of sanctions serving to end litigation, this Court previously established that such sanctions may not be imposed without the trial court first making findings establishing the willfulness or bad faith on the part of the offending party. Cattrell Cos. v. Carlton, Inc., Syl. Pt. 6, 217 W. Va. 1, 14, 614 S.E.2d 1, 14 (2005); see also State ex rel. Richmond Am. Homes of W. Va. v. Sanders, 226 W. Va. 103, 113, 697 S.E.2d 139, 149 (2010). Moreover, this Court previously held that "imposition of sanctions of dismissal and default

judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.” State ex rel. Richmond Am. Homes of W. Va. v. Sanders, 226 W. Va. 103, 113, 697 S.E.2d 139, 149 (W. Va. June 16, 2010).

As demonstrated in the excerpts above, the trial court unequivocally provided specific findings of fact establishing the willfulness, bad faith, and fault of Petitioners in relation to the misconduct identified such that its Order should be upheld and affirmed by this Court.

A fundamental tenet underlying the trial court’s dismissal decision that Petitioners refused to acknowledge in the underlying litigation and still continue to reject is their repeated, constant misconduct in failing to provide notice in an attempt to gain an unfair advantage in the litigation. Significantly, the issue of Petitioners’ lack of notice to Respondents was first identified in Gebhardt’s Motion to Dismiss, filed September 21, 2015, and first addressed by the trial court on October 16, 2015, wherein the trial court explained to Petitioners that it was the lack of notice which prompted Respondent Gebhardt’s initial dismissal request. Notice was subsequently addressed a year later at the Pretrial Conference on November 7, 2016, wherein Petitioners acknowledged prior “admonishment” for destruction of exterior brick on their home and the trial court again reiterated that it was Petitioners’ lack of notice to Respondents that was problematic. Even after these warnings by the trial court, Petitioners were not deterred whatsoever from issuing a defective subpoena *duces tecum* for the production of gravel receipts without prior notice to Gebhardt or his counsel.

Nevertheless, despite entry of an Order which complies with Syl. Pt. 2 of Bartles as discussed above, Petitioners want to misdirect attention away from their misconduct and

convince this Court to overturn the trial court's discretionary dismissal based upon a misconception that erroneous assessments of law exist. Specifically, Petitioners want this Court to instead focus on procedural technicalities in relation to service of a "trial subpoena," the statutory "one-party consent rule for legal audio recording of conversations," and "utilization of opposing party's expert" to justify their misconduct.

However, Petitioners' arguments are flawed. With regard to the subpoena *duces tecum*, Petitioners claim in their Appellate Brief that "[t]he subpoena to Respondent Gebhardt was not for 'discovery.' It was for the 'trial.'" However, Petitioners then illogically argue in their Appellate Brief that the subpoena *duces tecum* was sent to obtain discovery previously requested by Petitioners "over 2 years before the trail (sic) subpoena was served," thereby conceding that, in fact, the primary purpose of the subpoena *duces tecum* was for discovery of the gravel receipts.

Rule 45(b)(1) requires that "[p]rior notice of *any* commanded production of documents and things or inspection of premises before trial *shall* be served on each party in the manner prescribed by Rule 5(b)." ⁷ This Court has previously identified that "[t]he word 'shall' is mandatory" and "commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." See *State v. Allen*, 199 W. Va. LEXIS 134, 20 (1999); see also Syl. Pt. 1, *E.G. v. Matin*, 20 W. Va. 463, 498 S.E.2d 35 (1995). To comply with Rule 45 and Rule 5, Petitioners needed to provide notice of the subpoena *duces tecum* to Gebhardt's counsel.

⁷ It is further noted that this Court has previously recognized that Rule 45 regarding subpoenas is found in the section of the West Virginia Rules of Civil Procedure titled "Trials" and, therefore, it is not technically a discovery rule. *Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11 (2002). Nevertheless, Petitioners boldly assert that counsel is not entitled to notice of service of a trial subpoena commanding production of documents without citing any authority for their proposition, which appears to directly contradict the clear and unambiguous language of Rule 45(b)(1).

It is undisputed that Petitioners have never provided notice of the subpoena *duces tecum* to Gebhardt's counsel. Petitioners' failure to provide notice of the subpoena *duces tecum* on Gebhardt's counsel is concerning given the numerous occasions upon which the trial court advised Petitioners that Respondents were entitled to notice.

Most egregious, however, is the concession of Petitioners that notice was not provided **in a specific attempt to circumvent Gebhardt's counsel**. The critical aspect of the notice requirement as provided in Rule 45 "is to afford other parties an opportunity to object to production." Keplinger v. Virginia Elec. & Power Co., 208 W. Va. 11 (2002). By intentionally circumventing Gebhardt's counsel, Gebhardt was deprived of the opportunity for his counsel to advise and/or object to production and, instead, believing the subpoena *duces tecum* made a legitimate request for documents which Gebhardt would be required to locate and produce quickly, Gebhardt engaged in communications about the document request and litigation with persons available to testify against Gebhardt as fact witnesses.⁸

Petitioners apparently want this Court to set a new precedent which would allow parties and their attorneys to obtain documents directly from a represented party without objection by withholding notice of the document request from the party's counsel. Such a determination would hinder the fair administration of justice, would unfairly prejudice represented parties subjected to document requests without the benefit of their counsel, and would contradict the traditions of notice and fairness amidst the legal profession, as was the outcome in this case.

⁸ Respondent Gebhardt testified during the evidentiary hearing on November 15, 2016, that he had communications with Craig Templin regarding the request for gravel receipts. See Hearing Transcript, Appendix pg. 2399. Note, Mr. Templin was identified as a trial fact witness by Petitioners. See Appendix pgs. 394, 556, 590, 1688. According to Gebhardt, other communications with regard to the request for gravel receipts occurred with the third party that served the subpoena *duces tecum*, Dan Livingston; employees of Contractor Supply; and employees of Belmont Aggregate. See Appendix pgs. 2398-2399, 2401.

Moreover, Petitioners argue that there is no litigation misconduct because Gebhardt admitted that he was not physically intimidated by the contact. Again, Petitioners' argument is misplaced. The contention is not that the contact itself was intimidating, but that service of a subpoena *duces tecum* to a party-defendant on the eve of trial to circumvent ordinary discovery practices, without notice to the party's counsel, and without any notice to counsel or the trial court of outstanding discovery issues, is an intimidation and harassment tactic employed to gain an unfair advantage over the party-defendant.

This scenario is analogous to the litigation misconduct alleged in Kocher v. Oxford Life Ins. Co., 216 W. Va. 56 (2004). In that case, Oxford's Senior Vice President, Larry Goodyear, improperly obtained the home address of Mr. Kocher and proceeded to visit him at his home in West Virginia in an attempt to influence and encourage settlement between the parties without the involvement or presence of Mr. Kocher's counsel. Id. As a sanction for the misconduct, the circuit court struck Oxford's defenses and granted judgment on liability to Kocher against Oxford. Id. This Court affirmed the trial court's discretionary dismissal. Id.

Petitioners' intentional decision to withhold notice from Gebhardt's counsel of the subpoena *duces tecum* is part of a pattern of willful and bad-faith conduct identified by the trial court, inflicted by Petitioners with the specific intent to obtain an unfair advantage over Gebhardt in this case, and fell within the purview of the trial court's inherent authority to fashion appropriate sanctions, including dismissal. The trial court made appropriate findings of misconduct warranting sanctions and offered sufficient factual determinations to support the award of dismissal such that the trial court's discretion should not be disrupted.

With regard to the secret recording of Gebhardt, Petitioners justify their conduct by citing to the one-party consent rule, W. Va. Code § 62-1D-3(e). However, Petitioners' attempt to again

misguide this Court should be rejected. The trial court's Order suggests that although it was unable to find a decision from this Court as to whether Petitioners and their counsel were permitted to secretly obtain audio of Respondent Gebhardt for trial impeachment purposes after the threat of litigation had been invoked, the trial court was "totally uncomfortable with the secret recording," it found that Petitioners' conduct was "dishonorable and undermined the integrity of the judicial system," and it held that Petitioners' conduct was "underhanded and prejudicial to the fair administration of justice." Petitioners have not denied obtaining a secret recording of Gebhardt for trial impeachment purposes.

What Petitioners neglect to mention is that their conduct in obtaining a secret recording under the guise of an amicable meeting to resolve the alleged issues appears to directly contradict the overarching notions of fairness promulgated throughout the West Virginia Rules of Professional Conduct, the West Virginia Rules of Civil Procedure, and the West Virginia Rules of Evidence, which encourage resolution, fairness, and a just determination of each and every matter.⁹ The trial court correctly identified that luring Respondent Gebhardt into a meeting with the belief that he was working with, rather than against, Petitioners, while Petitioners induced him to attend the meeting with the intent to trap him in a misstep or misstatement for future litigation purposes, is contrary to the general notions of fairness and contrary to the ethical responsibilities of the parties in this litigation.

⁹ For instance, the West Virginia Rules of Professional Conduct defines "professional misconduct" as the engagement in conduct involving dishonest, fraud, deceit or misrepresentation, or the engagement in conduct which is prejudicial to the administration of justice. See Rule 8.4 of the W. Va. Rules of Professional Conduct. Rule 1 of the West Virginia Rules of Civil Procedure provides that the rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Rule 102 of the West Virginia Rules of Evidence provides that "[t]hese rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." Rules 407 and 408 of the West Virginia Rules of Evidence protect from disclosure of settlement negotiations and remedial measures to encourage and promote resolution.

Again, it is the conduct of Petitioners that the trial court considered in rendering its decision to award sanctions. After careful consideration of the evidence and testimony, the trial court acted within its inherent authority, made appropriate findings of misconduct warranting sanctions and offered sufficient factual determinations to support the award of dismissal such that the trial court's discretion should not be disrupted.

Finally, Petitioners reconcile their conduct in communicating with and attempting to retain Gebhardt's non-testifying consultant by arguing that there is no rule that expressly prohibits this conduct.¹⁰ Here, Petitioners' conduct again demonstrates an overarching desire to obtain an "unreasonable advantage" over Gebhardt by communicating with and attempting to retain his non-testifying consultant.¹¹ The concession by Petitioners is that the contact was initially innocent between Martin Maness, already retained by Petitioners, and Phil Huffner, Respondent Gebhardt's non-testifying consultant. However, upon learning of Huffner's status and involvement in the case, Petitioners and their counsel thereafter sought to discover the confidential defense strategy through Huffner.

Yet again, it is Petitioners' conduct to obtain an unfair advantage against Gebhardt which concerned the trial court. Reviewing the admissions of Petitioners and their counsel, along with the relevant pleadings, the trial court acted within its inherent authority, made appropriate findings of misconduct warranting sanctions and offered sufficient factual determinations to support the award of dismissal such that the trial court's discretion should not be disrupted.

¹⁰ W. Va. R. Civ. P. 26(b)(4) provides guidance on what can and cannot be discovered in relation to testifying and non-testifying experts and consultants and provides that the contact is conducted through formal discovery processes in direct contradiction to Petitioners' contention that there is no rule which prohibits such contact.

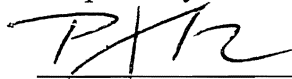
¹¹ Phil Huffner was identified as an expert in Petitioners' Third Expert Disclosure. See Appendix pg. 1074. Petitioners admit in their Appellate Brief that although they attempted to actually retain Mr. Huffner as an expert witness, Mr. Huffner did not agree to be retained at any point.

CONCLUSION

“On the appeal of the imposition of sanctions, the question is not whether the appellate court would have imposed a more lenient penalty had it been the trial court, but whether the trial court abused its discretion in imposing the sanction.” Bartles v. Hinkle, 196 W. Va. 381, 389-90, 472 S.E.2d 827, 835-36 (1996) (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642, 96 S. Ct. 2778, 2780, 49 L. Ed. 2d 747, 751 (1976)).

In this case, the trial court offered clear, concise identification of the misconduct, performed thoughtful and detailed analysis in relation to the imposition of dismissal as a sanction for the conduct, and made appropriate findings of willfulness, bad faith, and fault in relation to Petitioners’ conduct. Accordingly, for these reasons, Respondent Gebhardt respectfully requests that this Court confirm that the trial court acted within its inherent authority in issuing the February 3, 2017, Order, and affirm the trial court’s discretionary decision to dismiss this matter as a sanction for the identified litigation misconduct.

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SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH,
Plaintiffs Below, Petitioners,

vs.

Case No. 17-0206
(Ohio County Action No. 13-C-32)

ROBERT TODD GEBHARDT, MICHAEL COYNE,
and TRIPLE S&D, INC.,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Appellate Brief of Respondent Robert Todd Gebhardt** has been served this 1st day of August, 2017, by hand-delivery, to the following:

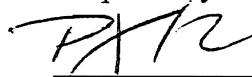
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